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IN THE

Supreme Court of the United States

OCTOBER TERM—1934

No. 211

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

against

WESTCHESTER SERVICE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENT

RALPH ROYALL,
ERNEST E. WHEELER,
Counsel for Respondent.

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I

THE OPINIONS OF THE COURTS BELOW

The Circuit Court of Appeals for the Second Circuit granted defendant's motion for a stay pending arbitration, reversing the order of the District Court for the Southern District of New York, with an opinion which is reported in 70 F. (2d) 297, and which appears at page 73 of the record.

The District Court rendered an opinion, which is not officially reported. This opinion is printed in the record (R. 61).

II

JURISDICTION

1

The jurisdiction of this Court is based upon Judicial Code, Section 240a, as amended by the act of February 13, 1925 (28 U. S. C. A. 347).

2

The order of the Circuit Court of Appeals for the Second Circuit was entered on the 23rd day of April, 1934.

3

The jurisdiction in the District Court was based on the diversity of citizenship.

ARGUMENT

POINT I

THE CIRCUIT COURT OF APPEALS HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

The decision of the Circuit Court of Appeals in this case is the first decision by a Circuit Court of Appeals construing Section 3 of the Federal Arbitration Act. The Court held that assuming (but not deciding) the parties to the contract had expressly selected another jurisdiction and statute for the enforcement of the arbitration clause, the Federal court should nevertheless grant a stay pending such arbitration.

The case of *California Prune & Apricot Growers' Ass'n* v. *Catz American Co.,* (C. C. A. 9th 1932) 60 F. (2d) 788, relied upon by the petitioner and the District Court was a special proceeding brought upon the petition of one of the parties to an agreement for an order directing the parties to the contract to proceed to an arbitration. The petitioner in that case relied upon the California Arbitration Statute and the special remedial provisions of that Statute empowering the courts to entertain petitions for the specific performance of arbitrations. The gravamen of the decision was simply this—that the California Statute did not purport to authorize the Federal court to exercise this peculiar and special power and that the California legislature would not have had the power to do so if it had tried.

Certainly the Court of Appeals of the 9th Circuit cannot be said to be in disagreement with the decision of the court below. This is demonstrated by the fact that the Circuit Court of Appeals for the 9th Circuit in the case of *Pacific Indemnity Co.* v. *Insurance Company of North America,* (C. C. A. 9th 1928) 25 F. (2d) 930, granted, as did the Court in the instant case, a stay upon the application of a defendant, where the suit was brought in defiance and disregard of an arbitration clause enforceable under the California Arbitration Statute. This conclusion was reached although the Federal Arbitration Act did not apply.

In neither of these cases was the Federal Arbitration Act before the Court.

POINT II

THE CIRCUIT COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS, NOR HAS IT DECIDED AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY PROBABLY UNTENABLE OR IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Petitioner places reliance on *Gilbert* v. *Burnstine,* (1931) 255 N. Y. 348. Except as authority for respondent, this case seems to us to have no bearing on the question decided below. It sustained a cause of action upon a British arbitration award and indicates that the New York Court of Appeals will compel a reluctant party to an arbitration clause in a contract, to abide by the provi-

sion even where the arbitration proceedings were contemplated to be held beyond the jurisdiction of the United States. We refer particularly to the quotation from this case on pages 20 and 21 of the petitioner's brief, as we believe it applies with full force to the attempt of petitioner to nullify the arbitration clause by bringing suit in the Federal court.

A motion for the stay of the trial of the action begun against us in the Federal court was not a seeking by us of the forum of the Federal court. We were brought there by the plaintiff involuntarily and in defiance of an agreement. To hold that the mention of one jurisdiction in this agreement would leave either party free to ignore the agreement in another jurisdiction, where the agreement is also valid and irrevocable, nullifies the agreement and makes it meaningless. It could hardly have been the intention of the parties to add the words to the arbitration clause "but either party may avoid arbitration by bringing suit in the Federal court."

The decision below is in complete harmony with the opinion in *Matter of Inter-Ocean Food Products Inc.,* (1923) 206 App. Div. 426. In that case the Court indicated that the proper remedy of a party to a contract containing a foreign arbitration clause was a stay in any action brought upon the contract in New York.

There seem to be no other New York cases bearing upon the question decided below.

The Circuit Court of Appeals apparently deemed there was a conflict in the Federal District Courts. The following cases were relied upon by the petitioner and the District Court: *The Silverbrook,* (D. C. 1927) 18 F.

(2d) 144; *The Fredensbro,* (D. C. 1927) 18 F. (2d) 983, and *The Beechwood,* (D. C. 1929) 35 F. (2d) 41.

These cases were in a different field. They were admiralty actions on contracts of affreightment which contained the usual London arbitration clause. In the *Silverbrook* and *Beechwood* cases the courts held that while Section 2 of the Federal Act was broad enough to validate such arbitration agreements, the other provisions of the Act having to do with procedure and enforcement in the Federal courts, negatived any such broad application and that an agreement taking the arbitration procedure and enforcement to a foreign country was not intended to be validated.

In the *Fredensbro* case the defendant pleaded as an exception to the jurisdiction of the Court the London Arbitration Clause in the Charter party. The Court retained jurisdiction of the libel, remarking that either party might avail itself in the suit of the arbitration clause in accordance with the United States Arbitration Act.

Directly contra and supporting respondent's view is *Danielsen* v. *Entre Rios Rys. Co.,* (D. C. 1927) 22 F. (2d) 326.

So in the case of *The Volsinio,* (D. C. 1929) 32 F. (2d) 357, the Court expressly disagrees with the decision on this point in the *Silverbrook* case.

Whether or not there is a conflict in the District Courts on the question presented in the instant case, the decision below is not in conflict with the weight of authority within the meaning of the Rules of this Court.

POINT III

THE CIRCUIT COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT. THERE IS NO QUESTION INVOLVING SPECIFIC PERFORMANCE BEFORE THIS COURT.

The question of enforcement of the arbitration clause by the Federal court is not involved in this case. The Federal Arbitration Act provides that an arbitration clause is valid and irrevocable. The petitioner has brought suit in the Federal court in violation of the arbitration clause in the contract. Respondent has simply, in accordance with the Federal Arbitration Act, asked for a stay of the litigation pending arbitration. Neither of the parties to this agreement have petitioned the Federal court for an order directing that arbitration should proceed. Only until this step is taken, would it be appropriate to determine whether the parties have in their agreement sought the sanction of another jurisdiction, and it would then become the problem of the moving party to proceed in a court having jurisdiction of specific performance.

The question as to whether the Federal courts have or have not this jurisdiction, is not involved in the issues of this case, and is therefore not now before the Supreme Court for determination.

POINT IV

THE SPECIFICATION OF ERRORS CITED BY THE PETITIONER DO NOT INVOLVE IMPORTANT QUESTIONS OF GENERAL LAW.

We submit that the numerous specifications of errors as to whether or not the respondent was in default in proceeding with arbitration, or upon whose shoulders the initiative rested to institute arbitration proceedings, or as to who should name the first arbitrator, or who repudiated the contract, or as to whether or not there was present an arbitrable issue, or as to whether the assessment of plaintiff's damages constituted an arbitrable issue, are trivial in their nature in so far as invoking the attention of the Supreme Court is concerned. These questions have been determined by the Circuit Court of Appeals in its opinion and their importance is limited to the parties involved.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

RALPH ROYALL,
ERNEST E. WHEELER,
Counsel for Respondent.